Supreme Court, U.S.
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No. 00-278

IN THE

Supreme Court of the United States

JANET CHANG,

Petitioner,

v.

FIRST AMERICAN TITLE INSURANCE CO. OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The respondent, FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK (hereinafter "FIRST AMERICAN"), opposes JANET CHANG'S petition for a Writ of Certiorari.

The petitioner, JANET CHANG, petitions the United States Supreme Court for a Writ of Certiorari claiming a violation of the protections guaranteed under the Fourteenth Amendment of the United States Constitution. Specifically, she claims that she was deprived of property without due process, and denied equal protection of the laws as guaranteed by the Constitution.

JANET CHANG's petition should be denied. She was not deprived of property without due process or denied equal protection of the law. JANET CHANG was given a full and fair opportunity to contest all proceedings taken against her in the underlying foreclosure action and was treated by the New York Courts as any other litigant.

Specifically, JANET CHANG challenges - as unconstitutional - the decision of the Appellate Division of the Supreme Court of New York, Second Judicial Department, which denied her motion to enlarge her time to appeal. Even assuming that her application had merit, her motion was made *after* the time to perfect her appeal had expired. Under the New York Code, Rules and Regulations, an appeal is deemed abandoned unless perfected, or the time to perfect enlarged, within six months after the date of the notice of

appeal. The petitioner - through no fault of FIRST AMERICAN or the New York Courts - let her appeal lapse. She has no constitutional right to absolution for her own failure to perfect her appeal, or to obtain an enlargement of her time to do so before her appeal time expired. Moreover, even if her time to appeal was enlarged, it is unlikely that she would have prevailed on appeal, because her challenge to the respondent's right to an equitable mortgage under the long-recognized principle of "equitable subrogation" was without merit. In this regard, she was, indeed, afforded and did avail herself of appellate review of the substantive issues concerning "equitable subrogation" that were raised in the Court of original jurisdiction - New York's Supreme Court, Queens County. *Great Eastern Bank v. Chang*, 227 A.D.2d 589, 643 N.Y.S.2d 203 (2d Dept. 1996), *lv. to app. dismissed*, 88 N.Y.2d 1064, 674 N.E.2d 337, 651 N.Y.S.2d 407.

STATEMENT OF JURISDICTION

It is respectfully submitted that the Supreme Court should not exercise jurisdiction to review the denial by the Appellate Division of the New York Supreme Court (New York's intermediate-appellate-level court) of JANET CHANG's belated motion for an enlargement of time to perfect her appeal from a Judgment of Foreclosure and Sale.

Section 1257(a) of Title 28 of the United States Code provides in relevant part that

> (a). . . [f]inal] judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by writ of certiorari . . . where the validity of a statute of any State in drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . .

Id.

The highest court in New York is the Court of Appeals - not the Appellate Division of the Supreme Court. Therefore, this petition does not invoke the Supreme Court's jurisdiction. However, assuming (but not conceding) that the Appellate Division's denial of enlargement - itself not appealable to the Court of Appeals - was a final decree by the highest New York court "in which a decision could be had," the Appellate Division's rule that appeals be deemed abandoned unless perfected, or the time to perfect is enlarged, within six months of the date of the appellant's notice of appeal, is not repugnant to the Constitution, treaties, or laws of the United States.

Moreover, a Writ of Certiorari is not a matter of right but of judicial discretion. There are no compelling reasons to grant a Writ of Certiorari in this matter. New York court rules were reasonable and properly followed in the underlying foreclosure action. There is no conflict between different circuit court of appeals on issues raised by JANET CHANG. There is no important federal question that has been raised by JANET CHANG. There is no conflict between different states on any issue raised by JANET CHANG that must be determined by this Court. The petition, therefore, should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The underlying action was brought to foreclose a first mortgage on real property located in New York, Queens County, known as 112-31 75th Avenue, Forest Hills, New York (hereinafter the "Mortgaged Premises").

(a) Background

STEVEN H. CHANG (hereinafter "STEVEN") and Hsu Chang were at one time the owners, as tenants-in-common, of the Mortgaged Premises. Hsu Chang died in 1982, leaving his undivided one-half interest to his wife - JANET CHANG.

In 1987, STEVEN borrowed $250,000.00 from GREAT EASTERN BANK (hereinafter "GREAT EASTERN") and delivered his promissory note acknowledging the debt. As collateral security for the payment of the debt, STEVEN delivered to GREAT EASTERN his mortgage under which he mortgaged his own undivided one-half interest as a tenant-in-common in the Mortgaged Premises. The Mortgage was duly recorded and the mortgage tax due under New York law was paid.

GREAT EASTERN's mortgage was intended to be a first mortgage. However, at the time of the closing of the mortgage-loan transaction, there existed on record a prior mortgage held by Long Island Savings Bank (hereinafter "LISB") which had been given by STEVEN and Hsu Chang. Accordingly, at the GREAT EASTERN mortgage closing a portion of GREAT EASTERN's mortgage loan proceeds - $85,138.30 - was used to satisfy LISB's mortgage thereby establishing GREAT EASTERN's first-mortgage lien. FIRST AMERICAN (a New York title insurance company) insured GREAT EASTERN that the mortgage loan to STEVEN was a first-mortgage lien. FIRST AMERICAN did not insure JANET CHANG - no contractual privity existed between them.

The LISB mortgage had been given in 1979 by the then co-owners of the real estate, STEVEN and Hsu Chang. When JANET CHANG succeeded to her husband's co-tenancy, his interest had been encumbered by the LISB mortgage.

(b) The Commencement of the Foreclosure Action

In 1991, STEVEN defaulted on the GREAT EASTERN mortgage loan, and GREAT EASTERN commenced the underlying foreclosure action in New York Supreme Court, Queens County, under New York's Real Property Actions and Proceedings Law. JANET CHANG served an Answer to the foreclosure complaint and asserted numerous affirmative defenses and counterclaims. In the main, JANET CHANG contested the validity of GREAT EASTERN's mortgage.

JANET CHANG was represented by the law firm of Berger & Kramer, LLP.

(c) Summary Judgment

In 1994, GREAT EASTERN moved, on notice, for summary judgment under Rule 3212 of New York's Civil Practice Law and Rules (hereinafter "CPLR"). JANET CHANG's attorneys opposed the motion and, indeed, cross-moved for summary judgment on her behalf. GREAT EASTERN argued that, even if the mortgage lien did not encumber JANET CHANGE's undivided interest, GREAT EASTERN it was entitled (i) to a first-mortgage lien, in the amount of the LISB mortgage, against JANET CHANG's and STEVEN'S unified interest as tenants-in-common under the doctrine of "equitable subrogation", and (ii) to a second-mortgage lien only against STEVEN's undivided interest as to the remainder of the amount owed to GREAT EAST-

ERN.[1] The theory being: JANET CHANG benefitted from GREAT EASTERN's satisfaction of the LISB mortgage to which GREAT EASTERN was equitably subrogated.

The motion and cross-motion were submitted to the Honorable Arthur W. Lonschein, Supreme Court Justice, Queens County, for determination. Justice Lonschein decided the motions in favor of the respondent, and held as follows:

> Plaintiff claims foreclosure not only as to the entirety of Steven H. Chang's interest, but also as to Janet Chang's interest, to the extent of the prior mortgage to the Long Island Savings Bank. As to this, it claims entitlement under the doctrine of equitable subrogation. In *King v. Pelkofski*, 20 N.Y.2d 326, the Court of Appeals adopted the formulation of the Restatement, Restitution, §162, that "where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

---

[1] The amount of the "second" mortgage was equal to the amount of the GREAT EASTERN loan less the amount of the equitable-first-mortgage lien.

Here, the mortgage to the Long Island Savings Bank was a lien on Janet Chang's interest in the premises. This lien was discharged using the plaintiff's money. In the court's opinion, it would be unjust to allow Janet Chang to retain the entire value of her interest, after the property is sold in foreclosure, free and clear of any obligation to repay that mortgage. Therefore, the court holds that the doctrine of equitable subrogation applies here, and Janet Chang's interest in the premises is available to satisfy the equitable lien created by the plaintiff's repayment of the Long Island Savings Bank mortgage.

It must be emphasized, however, that the plaintiff contends that the equitable lien is superior to the lien created to the mortgage given to Steven H. Chang, that the equitable lien is the first mortgage and latter loan is the second mortgage. Therefore, the interest in the property owned by Steven H. Chang and Janet Chang shall contribute equally to the repayment of the $85,138.30 which the plaintiff paid to the Long Island Savings Bank. Only after that is paid, shall a second mortgage by Steven H. Chang be paid out of the remainder of his interest.

The plaintiff's motion is granted, the answer, defenses and counterclaims asserted by the defendant, Janet Chang are stricken, and the plaintiff shall have summary judgment on its first and second

causes of action. A referee shall be appointed to compute the amounts due as set forth above.

Id.

(d) Janet Chang's First Appeal

The attorneys for JANET CHANG duly appealed from Justice Lonschein's determination to the Appellate Division of the Supreme Court, Second Judicial Department.

By Decision and Order dated May 28, 1996, a four-justice-appellate-panel unanimously affirmed Justice Lonschein's award of summary judgment holding:

> Steven Chang and his brother Hsu Chang acquired a residential condominium unit, and a mortgage on the property was held by Long Island Savings Bank. Upon his death, Hsu's wife, the appellant, succeeded to his interest in the unit and thereby became an owner of the unit with Steven as tenants in common. Thereafter, without the knowledge or consent of the appellant, Steven obtained a mortgage on the property from the plaintiff, Great Eastern Bank. After Steven defaulted on the mortgage payments, the plaintiff brought this action to foreclose on the mortgage given by Steven and also on the equitable lien created when it satisfied the Long Island Savings Bank mortgage.
>
> Where, as here, the funds of the mortgagee are used to discharge a prior lien upon the property of

> another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder (see, *King v. Pelkofski*, 20 N.Y.2d 326, 333; *Wagner v. Maenza*, A.D.2d [2nd Dept., Jan. 22, 1996]; *Zeidel v. Dunne*, 215 A.D.2d 472; *Cohn v. Rothman-Goodman Mgt. Corp.*, 155 A.D.2d 579, 580). The Supreme Court properly concluded that the mortgage to Long Island Savings Bank created a lien against the appellant's interest and Steven's interest in the condominium. Accordingly, the appellant and Steven were obligated to contribute equally to the repayment of the equitable lien.
>
> The appellant's remaining contentions are without merit.

Id.

Accordingly, JANET CHANG was afforded and availed herself of the appellate process and was permitted to contest - on appeal - the award of summary judgment granted against her by the Queens County Supreme Court.

(e) The Order of the Appellate Division Was a Non-final Determination and Could Not Be Further Appealed to the New York Court of Appeals

Thereafter, JANET CHANG moved under §5602(a)(1)(i) of the CPLR for permission to appeal to the New York Court of Appeals from the Second Department's affirmance. CPLR §5602(a)(1)(i) provides that an appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. *Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division.* Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. *Such appeal may be taken*:

> 1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right. . . .

Id. (emphasis added).

The order sought to be appealed to the Court of Appeals was not a final determination, and was not appealable as of right. CPLR §5601. The Appellate Division had merely affirmed the order granting the foreclosing mortgagee summary judgment, dismissing JANET CHANG's defenses and counterclaims, and directing the appointment of a referee to compute the amounts due to the plaintiff. The foreclosure action had not been finally determined. Further proceedings were necessary, and all the issues in the action had not been disposed of. CPLR §5611. Therefore, under New York's CPLR, JANET CHANG could not appeal further to the Court of Appeals. Her motion for leave to appeal was denied.

(f) The Referee's Hearing

On August 14, 1997, a referee's hearing was conducted by the court-appointed referee. JANET CHANG was present and had the opportunity to question witnesses, and to make a statement for the record regarding her objections to the foreclosure action.

The amounts due and owing to the plaintiff were undisputed and established by the documents admitted in evidence at the hearing. It was shown that $180,080.59 was owed on the "equitable-first" mortgage, and that $159,919.13 was owed on the "second" mortgage.

(g) The Entry of the Judgment of Foreclosure and Sale

After the Referee's hearing, a motion was made *on notice* to JANET CHANG for a Judgment of Foreclosure and Sale and confirmation of the referee's computation of the amounts due. The procedure followed in this regard was that which is prescribed in New York's Real Property Actions and Proceedings Law as it relates to foreclosure actions.

The Judgment of Foreclosure and Sale with notice of its entry was served upon JANET CHANG on October 7, 1998. JANET CHANG moved the Queens County Supreme Court to vacate the Judgment. Her motion was denied by Justice Lonschein. JANET CHANG also attempted to stay the attendant foreclosure sale by making separate motions before the Queens County Supreme Court and the Appellate Division. Both motions were denied.

(h) The Foreclosure Sale and Subsequent Proceedings

The foreclosure sale took place on December 4, 1998. JANET CHANG was an active bidder at the foreclosure sale, but an outside bidder purchased the property for $555,000.00. See Appendix A.

A referee's closing took place at which time JANET CHANG was represented by another attorney, Edward Odesser, who acknowledged receipt of the surplus monies ($169,188.09) due to JANET CHANG from the sale:

> Received from John R. Dietz, Esq., the Referee appointed by the Judgment herein, to make the sale

> of the premises therein described, the sum of *$169,188.09*, representing one-half of the surplus to be paid to defendant, Janet Chang, pursuant to the judgment, *but without prejudice to defendant Janet Chang's right to pursue the appeal of said judgment, or any other plenary action she may have against the plaintiff or others arising out of the subject matter of this action*. Chang acknowledges that she will not vacate the foreclosure sale. /s/ Edward Odesser Attorney for Janet Chang

Id. (emphasis added).

JANET CHANG - thereafter claiming that her new attorney had no authority to accept the funds - returned the $169,188.09 to the referee.

(i) Janet Chang's Appeal from the Judgment of Foreclosure and Sale was Dismissed Because She Abandoned It

JANET CHANG duly filed a notice of appeal from the Judgment of Foreclosure and Sale, but did not perfect her appeal within the time prescribed by the Court's rules - six months. CHANG did not perfect her appeal but instead moved - after the time to appeal expired - for an extension of time. The Appellate Division, Second Department, denied her motion and, thereafter, denied her motion to reargue. See Appendix B.

Simply stated, JANET CHANG allowed her appeal to lapse. She did not comply with the rules of the Appellate Division which provide as follows:

> (d) Enlargements of Time.
>
> (1) . . . [A]n enlargement of time to perfect an appeal, action or proceeding, or to serve and file a brief, may be granted, upon good cause shown, only upon motion on notice to all parties.
>
> * * *
>
> (e) Notwithstanding any of the provisions of this Part, a civil appeal, action, or proceeding shall be deemed abandoned unless perfected
>
> (1) within six months after the date of the notice of appeal, order granting leave to appeal, or order transferring the proceeding to this court . . . unless for good cause shown an order shall have been entered on motion extending the time to perfect. The clerk shall not accept any record or brief for filing after the expiration of such six-month period.

22 N.Y.C.R.R. §678.8.

In New York, these rules apply to *all* litigants - not just JANET CHANG. She had six months to perfect her appeal, or to secure an enlargement of her time to do so. She did neither. Instead, she moved to revive an already abandoned appeal. Her belated motion was denied and her appeal dismissed. JANET CHANG alleges that the Appellate Divi-

sion's refusal to revive the abandoned appeal was a violation of due process and equal protection. However, she cannot successfully argue this point in light of her own failure to follow the procedural rules governing the appellate process. Moreover, even if her motion to enlarge was timely, she was not automatically entitled to enlargement. She was still required to show "good cause" for the enlargement. Accordingly, the Appellate Division still had the discretion to deny the motion on lack of good cause, even if timely made.

(j) Motions After Enlargement of Time Was Denied

JANET CHANG then moved the New York Court of Appeals for permission to appeal the Appellate Division's denial of time-enlargement. Section 500.11(d)(iv) of the Rules of the Court of Appeals provides that the movant must showthat this court has jurisdiction of the motion and of the proposed appeal, including that the order of judgment sought to be appealed from is a *final determination* or comes within the special class or non-final orders which are appealable by permission of the Court of Appeals (CPLR 5602[a][2]).

22 N.Y.C.R.R. §500.11(d)(iv) (emphasis added).

The Appellate Division's Order denying time-enlargement was not a final determination and was not one of the non-final orders appealable by permission pursuant to CPLR §5602(a)(2). See Cohen, *Powers of the New York Court of Appeals*, § 80 *et. seq*. (rev.ed. 1951). JANET CHANG's motion for leave to appeal to the Court of Appeals was denied. She then moved to reargue, and that motion was denied as well.

She now petitions the United States Supreme Court for a Writ of Certiorari. Her petition should be denied.

POINT I

JANET CHANG WAS NOT DENIED DUE PROCESS

The Fourteenth Amendment to the United States Constitution guarantees due process and equal protection. The Fourteenth Amendment states that no state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law. Due process is a concept dealing with the procedures necessary to assure fairness and neutrality in actions taken by the government. The constitutional limitations and prohibitions embodied in the Fourteenth Amendment apply to state or federal activity and not to purely private activity.

To invoke the Fourteenth Amendment, the Supreme Court must first determine the existence of "state action" because the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the state's. The Fourteenth Amendment erects no shield against private conduct, however discriminatory or wrongful. *Blum v. Yaretsky*, 457 U.S. 991, 73 L.Ed.2d 534, 102 S.Ct. 2777 (1982). For example, in *Flag Brothers, Inc. v. Brooks*, 436 U.S. 149, 56 L.Ed.2d 185, 98 S.Ct 1729 (1978), the Supreme Court held that no state action was involved in the sale of goods taken to a warehouse for storage after the plaintiff was

evicted. The Court rejected the argument that the sale was attributable to the state because the state authorized it by enacting the Uniform Commercial Code. A state's mere acquiescence in a private action does not convert that action into that of the state. In the instant case, the fact that JANET CHANG's interest in real property was foreclosed under New York law does not mean that state action was involved in depriving her of her interest. Accordingly, JANET CHANG cannot establish that state action was involved which allegedly deprived her of property without due process.

Turning to the question of the Appellate Division's denial of time-enlargement, it should be noted that the guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the subject sought to be attained. *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed.2d 940, 54 S.Ct. 505 (1934). The due process clause guards only against a purposeful abuse of power, not mere negligence. *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986).

In determining whether a person's Fourteenth Amendment rights were violated, the Supreme Court will not consider whether a state court misapplied its own law. *Estelle v. McGuire*, 502 U.S. 62, 112 Sup.Ct. 475, 111 L.Ed.2d 385 (1991). JANET CHANG cannot be heard to complain - on constitutional grounds - that the respondent should not have been afforded an equitable mortgage based upon the doctrine of equitable subrogation.

In the instant case, JANET CHANG was afforded every opportunity to contest the proceedings taken against her in the underlying foreclosure action. She was represented by a law firm at the commencement of the foreclosure action and when she contested the motion for summary judgment. Her attorneys perfected and prosecuted an appeal to the Appellate Division, Second Department. JANET CHANG was thereafter represented in the foreclosure action by another lawyer, Edward Odesser. JANET CHANG realized, but rejected, in excess of $169,000.00 from the sale of the Mortgaged Premises.

Aside from the appeal which she *did* perfect, she filed a notice of appeal from the Judgment of Foreclosure and Sale. However, she failed to perfect the appeal within the six month time limit provided by the Court's Rules. She cannot be heard to complain - on constitutional grounds - that the Appellate Division, or any New York Court, deprived her of life, liberty and property without due process, by denying her belated request for an enlargement of time to appeal. Simply stated, JANET CHANG did not follow the reasonable procedures outlined by the Court's rules - those were: perfect an appeal, or apply for and obtain an enlargement of the time to appeal, within six months of the date of her notice of appeal.

Indeed, a period of six months within which to perfect an appeal is not unreasonable, nor too short a period of time within which to perfect. She was not entitled - on constitutional grounds - to an enlargement.

In summary, the New York Courts, on all levels (Court of Appeals, Appellate Division and Supreme Court), entertained numerous motions made by JANET CHANG in her effort to contest the underlying foreclosure action. And, JANET CHANG cannot avail herself of appellate review on the substantive issues regarding "equitable subrogation". She cannot complain - on constitutional grounds - because she was unsuccessful.

JANET CHANG was accorded due process in all respects.

POINT II

JANET CHANG WAS AFFORDED EQUAL PROTECTION UNDER THE LAW

The Fourteenth Amendment to the Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The equal-protection clause directs that all persons similarly situated should be treated alike and affords a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others. In essence, equal protection means that all persons similarly situated should be treated alike, and that no person or class of persons shall be denied the same protection under the laws enjoyed by others in similar circumstances. *Califano v. Westcott*, 442 U.S. 682, 61 L.Ed.2d 176, 99 S.Ct. 2545 (1979).

Equal protection analysis is said to be two-tiered. There must be a "rational basis" for any classification, requiring the person challenging the statute to show that no legitimate state goals are advanced by the classification. *Dandridge v. Williams*, 397 U.S. 471, 487, 25 L.Ed. 491, 90 S.Ct. 1153 (1970). However, when the law being challenged applies to suspect classifications (for example, race, alienage and national origin) or fundamental rights (for example, freedom of speech and religion, the right to travel, the right to vote, and the right to divorce, procreation and marriage) the law must pass a "strict scrutiny" test. That is, equal protection is violated unless the classification is necessarily related to a compelling state interest and is narrowly tailored to meet that compelling state interest. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L.Ed.2d 520, 96 S.Ct. 2562 (1976).

One who makes an equal protection challenge must overcome a strong presumption of constitutionality.

There is no denial of equal protection by a course of procedure that is applied to legal proceedings in which a particular person is affected if such a course would also be applied to any other person in the state under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U.S. 101, 43 L.Ed. 91, 18 S.Ct. 805 (1898). Moreover, it has been held that there is no constitutional right or entitlement to free legal counsel in a private, civil action, or to the effective assistance of counsel in such an action. See, *Reese v. Owens-Corning Fiberglass Corp.*, 221 F.3d 1352 (10th Cir. 2000), 2000 WL 963333 (July 12, 2000), *MacCuish v. United*

States, 844 F.2d 733 (10th Cir. 1988), *McGee v. McGee*, 180 Misc.2d 575, 583, 694 N.Y.S.2d 269, 276 (Sup.Ct. Suffolk Co. 1999).

Furthermore, the guaranty of equal protection does not insure uniformity of judicial decisions. *Milwaukee Electric Rail & Light Co. v. Wisconsin*, 252 U.S. 100, 64 L.Ed. 476, 40 S.Ct. 306 (1920). A person is not deprived of equal protection of the laws if a state court departs from the precedence established in earlier decisions. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U.S. 54, 62 L.Ed. 145, 38 S.Ct. 40.

Finally, the equal protection guaranty does not require an appeal in a particular type of proceeding, or in some particular situation, if all persons within the class are treated alike. *Butterfield v. Rudde*, 58 N.Y. 489 (1874).

JANET CHANG was treated like any other litigant, and had the opportunity to, and did, retain the services of two different attorneys to represent her. She also apparently had the wherewithal to pay for the legal services of a private attorney.

POINT III

THE DOCTRINE OF "EQUITABLE SUBROGATION" HAS LONG BEEN RECOGNIZED IN NEW YORK AND WAS CORRECTLY APPLIED TO AFFORD THE RESPONDENT AN EQUITABLE MORTGAGE LIEN

Under the doctrine of equitable subrogation, FIRST AMERICAN (successor in interest to GREAT EASTERN) stepped into the superior position once held by LISB to the extent of the money GREAT EASTERN disbursed to satisfy that mortgage. *Great Eastern Bank v. Chang*, 227 A.D.2d 589, 643 N.Y.S.2d 203 (2d Dept. 1996), *lv. to app. dismissed*, 88 N.Y.2d 1064, 674 N.E.2d 337, 651 N.Y.S.2d 407. See *Coronet Capital Co. v. Spodek*, 265 A.D.2d 292, 696 N.Y.S.2d 191 (2d Dept. 1999), *Federal Nat'l Mortgage Assoc. v. Woodbury*, 254 A.D.2d 182, 679 N.Y.S.2d 116 (2d Dept. 1998).

"Under the doctrine of equitable subrogation, when the circumstances are appropriate, one who pays the debt of another steps into the shoes of the creditor and takes the position, rights and remedies of that creditor - including its priority over junior creditors and liens". Heffernan, *Equitable Subrogation: No-So-Secret Defense Weapon*, Title News, July-August 1994, at 6.

The seminal case in New York is *King v. Pelkofski*, 20 N.Y.2d 326, 282 N.Y.S.2d 753, 229 N.E.2d 435 (1967), in

which the Court of Appeals adopted the Restatement on Restitution as a basis for remedying unjust enrichment. The Court of Appeals stated the following:

> Turning to the core question, that of subrogation, the governing principle has been states as follows: Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances, that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder. (Restatement, Restitution, § 162).

282 N.Y.S.2d, at 757-58. The purpose of the doctrine is to compel the ultimate payment of a debt by one who in justice, and good conscience ought to pay it. *Korea Commercial Bank of New York. v. Ianos*, 236 A.D.2d 249, 653 N.Y.S.2d 561 (1st Dept. 1997).

In *King v. Pelkofski*, the plaintiff commenced an action to foreclose its mortgage. The defendant, Joseph Pelkofski, was not the owner of the property. Pelkofski's wife (the true owner) interposed an answer alleging that the mortgage was void. However, with the proceeds of the plaintiff's loan a prior mortgage affecting the real property which had been executed by both Pelkofski and his wife had been satisfied. The Court of Appeals held that the plaintiff-mortgagee was entitled to be subrogated to the rights of the prior mortgagee, whose lien was senior to the wife's interest in the property

and which lien had been discharged by the proceeds of plaintiff's loan. Plaintiff was also entitled to priority for all funds advanced at the closing to satisfy obligations of Pelkofski's wife. See also, *Whitestone Savings and Loan Association v. Moring*, 286 A.D. 1042, 145 N.Y.S.2d 335 (2d Dept. 1955); *Union Savings Bank of Patchogue v. Dudine*, 40 Misc.2d 155, 242 N.Y.S.2d 692 (Sup.Ct. Suffolk Co. 1963).

The court in *Boston Trade Bank v. Kuzon*, 154 Misc.2d 217, 584 N.Y.S.2d 994 (Sup.Ct. N.Y.Co. 1992), articulated the doctrine of equitable subrogation as follows:

> In New York, by statute the priority of mortgage liens are determined by the order in which same are recorded. This procedure, known as race-notice, gives priority to the lienor who lacks knowledge of the outstanding lien and wins the race to record. However, there are situations where priority established under the aforementioned race-notice statute may be set aside by a court, dependent upon principles of justice and equity as applicable to a particular situation. In appropriate circumstances, a court in equity will subrogate the rights of the subsequent lienholder so as to place such a creditor into the shoes of a prior creditor. The doctrine of equitable subrogation plays upon notions of fairness to preclude situations where a party might be unjustly enriched by

> the acts of another in discharging an existing lien, placing another unknown lienholder in a superior position.

584 N.Y.S.2d, at 996 (citations omitted).

In *Brown v. Bellamy*, 170 A.D.2d 876, 566 N.Y.S.2d 703 (3d Dept. 1991), the court recognized that the doctrine of equitable subrogation has been extended rather than restricted. 566 N.Y.S.2d, at 704. The rule adopted in *King v. Pelkofski* has been applied to numerous situations where there has been unjust enrichment. The Court of Appeals *did not* limit the application of equitable subrogation to the facts of that case. The doctrine has been applied in various forms to avoid unjust enrichment.

In *Wainco Funding v. Barral*, N.Y.L.J. September 17, 1991, at 5, col. 3 (Sup.Ct. Queens Co.), the holder of a third mortgage whose proceeds were used to satisfy in full the first mortgage on the property sought to apply equitable subrogation to defeat the priority of an intervening second mortgage which had been recorded but was unfortunately not revealed in the third mortgagee's title search. The third mortgagee argued that even though the intervening second mortgage had been recorded first the third mortgagee *believed* that it would have priority over all others. It became apparent that it was mistaken. The court applied equitable subrogation even though the third mortgagee had constructive notice of

the intervening lien and had mistakenly believed that it would have priority.

In *G.B. Seely's Son, Inc. v. Fulton-Edison, Inc.*, 52 A.D.2d 575, 382 N.Y.S.2d 516 (2d Dept. 1976), a tenant was subrogated to the rights of a mortgagee as against the tenant's landlord to the extent of the tenant's payment of the mortgage. The court further recognized that the doctrine is equitable in nature and does not rest upon any right acquired by contract but simply upon the equitable principle that substantial justice should be attained regardless of form. 382 N.Y.S.2d, at 520.

In *Ellenville National Bank v. Shangri La Hotel, Inc.*, 56 Misc.2d 653, 289 N.Y.S.2d 670 (Sup.Ct. Ulster Co. 1967), the court held that a defendant in a foreclosure action who made a gratuitous payment of tax arrears, which were superior liens upon the property being foreclosed, was entitled to equitable subrogation in order to prevent an unjust enrichment.

As is supported by the authorities cited above, the doctrine of equitable subrogation has been recognized by all New York Courts and has been applied in diverse ways in order to remedy unjust enrichment. It was similarly and correctly applied in JANET CHANG's case as well.

CONCLUSION

JANET CHANG is not entitled to review by the United States Supreme Court of this matter. She cannot be heard to complain - on constitutional grounds - that she was unsuccessful in her State Court challenge of the application of the doctrine of equitable subrogation. More importantly, JANET CHANG was given every opportunity to contest all proceedings. The New York Courts entertained all of her numerous motions. She obtained appellate review of the determination of the substantive legal issues. She *had* the benefit of counsel at various states of the proceedings. She personally appeared and contested the proof offered on the amount of the underlying liens. She was permitted to bid at the foreclosure sale. She was offered the surplus money she was entitled to, but she rejected it. Her rights as a litigant were protected. The Constitution does not guaranty a victory - only the opportunity to be treated equally and fairly, and to be heard. JANET CHANG was treated like any other litigant and was afforded the right to be heard. Her petition should be denied.

Respectfully submitted,

FLOYD G. GROSSMAN, ESQ.
Counsel of Record
MICHAEL J. SPITHOGIANNIS, ESQ.
DOLLINGER, GONSKI & GROSSMAN
One Old Country Road
Carle Place, New York 11514
(516) 747-1010
Attorneys for Respondent

Appendix A

APPENDIX A- SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
CORNELIUS J. O'BRIEN
THOMAS R. SULLIVAN
GLORIA GOLDSTEIN, JJ.

98-10381

DECISION & ORDER ON MOTION

First American Title Insurance Company of New York, etc., respondent, v. Steven H. Change, et al., defendants, Janet Chang, appellant.

Motion by the appellant to recall and vacate a decision and order of this court dated June 4, 1999, which dismissed an appeal from a judgment of the Supreme Court, Queens County, pursuant to 22 NYCRR 670.8(e) for failure to timely perfect the same, to reinstate the appeal, and to enlarge the time to perfect the appeal.

Appendix A

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., O'BRIEN, SULLIVAN, and GOLDSTEIN, JJ., concur.

ENTER:

Martin H. Brownstein

Clerk

August 20, 1999

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK v CHANG

Appendix B

APPENDIX B- SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS

Index No. 28451/92

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

REFEREE'S REPORT OF SALE

Appendix B

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS

I, JOHN R. DIETZ, the Referee appointed by the judgment entered in this action bearing date the 10th day of September, 1998, to make the sale of the mortgaged lands and premises therein particularly described, do respectfully report as follows:

FIRST.- That I caused due notice of the sale of the said lands and premises by me at public auction on the 4th day of December, 1998 at 11:00 o'clock in the forenoon, to be given and published according to law and the rules and practice of this Court, as will fully appear by the affidavits hereto annexed.

SECOND.- That at the time and place for which the sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said mortgaged lands and premises for sale to the highest bidder, and sold the same to WILLIAM GRIMES for the sum of $555,000.00 that being the highest sum bid therefor, and received $55,000.00, ten percent of said sum.

THIRD.- That I have received from such purchaser the balance of the said purchase money, to wit: the sum of $500,000.00.

FOURTH.- That I have paid out of the said purchase money the sum of $1,512.94 for taxes which were liens on

the said mortgaged premises at the time of such sale, and for which receipts are hereto annexed.

FIFTH.- I deposited the balance of said purchase money in Marine Midland Bank.

SIXTH - That I have drawn from the moneys so deposited, and retained for my fees, the sum of $500.00

SEVENTH.- I have disbursed for advertising expenses, as shown by bills hereto annexed, the sum of $1,313.40.

EIGHTH.- I have paid to the attorney(s) for the plaintiff(s) the sum of $1,420.94 for the costs together with interest.

NINTH.- I have paid to the attorney(s) for the plaintiff(s) for the sum due on the equitable first mortgage upon which this action was brought, and directed to be paid by said judgment, the sum of $201,747.79 for which a receipt is hereto annexed.

TENTH- That I have made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the said mortgaged premises so sold.

ELEVENTH- Pursuant to the terms of the Judgment, surplus monies, if any, out of the foreclosure Sale after the payment of the first mortgage shall be divided equally between plaintiff, as the second mortgagee of the interest of defendant, STEVEN CHANG ($159,919.13 with interest from August 14, 1997) and defendant, JANET CHANG,

without the necessity of the holding of a surplus money proceeding. A calculation of the foregoing distribution is annexed hereto.

TWELFTH- There remains upon deposit in the aforementioned depository to the credit of this action, surplus moneys to the amount of $0.00 subject to the order of this court, as appears by the annexed voucher.

Annexed hereto and made a part of this, my report, is a statement showing the several items aforesaid and the mode of computation

All of which is respectfully submitted.

Dated: February 23, 1999

/s/_____

JOHN R. DIETZ Referee

STATEMENT

Amount due on the equitable mortgage, as per judgment.. ..... $180,080.59

Interest from 8/14/97 to date (1/4/99) ..... $ 21,667.20

$201,747.79

Appendix B

Amount of Purchase Money	$555,000.00
Paid for taxes	$1,512.94
Referee's fees	500.00
Advertising expenses	1,313.40
Plaintiff's costs and allowance with interest	1,420.94
Guardian's costs	0.00
Tax stamps on deed	2,220.00
Amount allowed plaintiff(s)	201,747.79
Legal fee per Judgment	0.00
New York City Transfer Tax	7,908.75
Total	$216,623.82

Balance being amount paid plaintiff(s) on account of claim (Equitable Mortgage)$201,747.79

Subtotal Remaining: $338,376.18

Fifty (50%) Balance to Plaintiff....$169,188.09

Fifty (50%) Balance to Defendant, JANET CHANG $169,188.09

Deficiency-Surplus $ 0.00

Dated: February 23, 1999

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

Received _____ from JOHN R. DIETZ, Esq., the Referee appointed by the judgment herein, to make the sale of the premises therein described, the sum of $1,313.40 for advertising expenses, $1,429.94 in full for the costs, with interest, awarded plaintiff(s) by the said judgment, and also $201,747.49, including interest, the sum due plaintiff on the equitable mortgage upon which this action was brought, and directed to be paid to plaintiff by said judgment, and the sum of $169,188.09, representing one-half of the surplus to be paid to plaintiff pursuant to the judgment arising out of plaintiff's second mortgage against the interest of defendant, STEVEN CHANG.

DOLLINGER, GONSKI & GROSSMAN
By:/s/
FLOYD G. GROSSMAN Attorney(s) for Plaintiff(s)

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

State of New York, County of ss:

JOHN R. DIETZ, being duly sworn, deposes and says:

That he is the referee duly appointed herein to make the sale in the above entitled action, and the officer who made such sale.

That the above report of sale signed by him is in all respects true and correct, and said report and statement annexed thereto contain a true, accurate and complete report of the disposition of the proceeds of such sale.

Sworn to before me this
23 day of February, 1999

/s/
JOHN R. DIETZ, Referee

Appendix B

/s/
Notary Public

SCOTT J. SOSKIN
Notary Public, State of New York
No. 41-4835656
Qualified in Queens County
Commission Expires: Jan 31, 2000

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FIRST AMERICAN TITLE INSURANCE
COMPANY OF NEW YORK,

Plaintiff,

-against-

STEVEN H. CHANG, et al.,

Defendants.

Received from JOHN R. DIETZ, ESQ., the Referee appointed by the Judgment herein, to make the sale of the premises therein described, the sum of $169,188.09, representing one-half of the surplus to be paid to defendant, JANET CHANG, pursuant to the judgment, but without prejudice to defendant JANET CHANG's right to pursue the appeal of said judgment, or any other plenary action she may have against the plaintiff or others arising out of the subject matter of this action. CHANG acknowledges that she will not vacate the foreclosure sale.

/s/
EDWARD ODESSER
Attorney for JANET CHANG
Index No. 28451/92

Appendix B

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK

Plaintiff,

-against-

STEVEN H. CHANG, et al.

Defendants.

Referee's Report of Sale